

1 HONORABLE JAMAL N. WHITEHEAD
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 SEATTLE SCHOOL DISTRICT NO. 1,
9
10 Plaintiff/Counterclaim Defendant,

v.
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12 KURT BENSHOOF,
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14 Defendant/Counterclaim Plaintiff,
15 A.R.W. by and through his father,
16 KURT BENSHOOF,
17 Counterclaim Plaintiff,
18
19 v.
20 NATHAN L. CLIBER, SARAH E.
21 SPIERLING MACK, GREGORY C.
22 NARVER, JESSICA R. OWEN, BLAIR M.
23 RUSS,
24 Counterclaim Defendants.

No. 2:23-cv-01829-JNW

DISMISSED COUNTERCLAIM
DEFENDANTS SARAH E. SPIERLING
MACK AND GREGORY C.
NARVER'S COMBINED RESPONSE
TO DEFENDANT KURT
BENSHOOF'S MOTION TO VACATE
AND MOTION FOR IN CAMERA
REVIEW

NOTE ON MOTION CALENDAR:
February 6, 2025

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23 I. INTRODUCTION
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25 On July 19, 2024, this Court dismissed Plaintiff Seattle School District's Complaint for
26 Declaratory Relief for lack of subject matter jurisdiction, Dkt. # 67, and dismissed all of
27 Defendant Kurt Benshoof's ("Benshoof's") counterclaims, Dkt. # 66, disposing of this case in its
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1 entirety. Benshoof subsequently filed a Notice of Appeal. Dkt. # 68. Now, six months after the
 2 Court dismissed all claims and counterclaims, and five months after Benshoof filed his Notice of
 3 Appeal, Benshoof has filed two motions before this Court: 1) a Motion to Vacate the Court's
 4 order dismissing Benshoof's counterclaims, Dkt. # 75; and 2) a Motion for in Camera Review of
 5 dismissed counterclaim defendants' e-mails with their legal counsel, Dkt. # 76. Due to the
 6 procedural posture of this case, both motions fail, and they lack merit in any event. For these
 7 reasons, the Court should deny Benshoof's Motion to Vacate and Motion for in Camera Review.

II. PROCEDURAL HISTORY

10 On November 28, 2023, Plaintiff Seattle School District No. 1 (the "District") filed a
 11 Complaint for Declaratory Relief regarding its obligations to respond to Benshoof's request for
 12 certain school records. *See* Dkt. # 67 at 3. In response, Benshoof filed a 42 U.S.C. § 1983
 13 ("Section 1983") counterclaim against parties including general counsel to the District, Gregory
 14 Narver ("Narver"), and outside legal counsel to the District, Sarah Mack ("Mack"). *See* Dkt. # 66
 15 at 2. Narver and Mack moved to dismiss Benshoof's counterclaims. *Id.* The Court granted their
 16 motions, and in an order dated July 19, 2024, dismissed all of Benshoof's counterclaims. *Id.*
 17 Specifically, the Court dismissed the Section 1983 claims against private parties, including
 18 Mack, "[b]ecause Benshoof's allegations against private parties lack state action," *id.* at 9, and
 19 against Narver because he "is entitled to qualified immunity," *id.* at 12. The Court also dismissed
 20 the District's Complaint for lack of subject matter jurisdiction. Dkt. # 67. The Court
 21 subsequently directed the Clerk to close the case. Dkt. # 68. Benshoof filed a Notice of Appeal to
 22 the Ninth Circuit Court of Appeals on August 21, 2024. Dkt. # 72. Despite the fact that his
 23 appeal remains pending, on January 15, 2025, Benshoof filed the present Motion to Vacate and
 24 Motion for in Camera Review before this Court.

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III. ARGUMENT

A. The District Court Lacks Jurisdiction to Hear Benshoof's Motion to Vacate, But Even If Benshoof Could Bring His Motion, It Lacks Merit.

1. Benshoof's pending appeal precludes his Motion to Vacate.

By filing his Notice of Appeal, Benshoof divested this Court of jurisdiction to hear his Motion to Vacate under Federal Rule of Civil Procedure (“Rule”) 60(b). In the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”), “the filing of a notice of appeal divests the district court of jurisdiction to dispose of [a Rule 60(b)] motion after an appeal has been taken, without a remand from [the appellate court].” *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984); *Gould v. Mut. Life Ins. Co. of New York*, 790 F.2d 769, 772 (9th Cir. 1986) (“Unless the appellate court remands to the district court, the latter is without jurisdiction to consider motions to vacate judgment.”). Thus, while a case is on appeal, “the district court [does] not have jurisdiction to decide [a Rule 60(b)] motion.” *Scott*, 790 F.2d at 772. “To seek Rule 60(b) relief, [while a case is on appeal,] the proper procedure is to ask the district court whether it wishes to entertain the motion, or to grant it, and then move [the appellate] court, if appropriate, for remand of the case.” *Id.* (original punctuation omitted). Benshoof failed to comply with these procedural requirements. Because he failed to first ask this Court to entertain his motion, and failed to seek and obtain remand from the Ninth Circuit, his Motion to Vacate is procedurally defective and must be denied.

2. Even if this Court could consider Benshoof's motion, it lacks merit.

Even if Benshoof could overcome the procedural errors with his Motion to Vacate, he cannot prevail on the merits. Benshoof appears to move to vacate this Court's dismissal of his

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1 counterclaims under both Rule 60(b)(2) and (3), *see* Dkt. # 75 at 1, but he cannot satisfy the
 2 requirements of either provision. The Court should thus refuse to entertain his motion.

3 First, Rule 60(b)(2), concerning new evidence, is inapplicable because Benshoof asks the
 4 court to vacate a pre-trial order of dismissal for failure to state a claim. Rule 60(b)(2) permits a
 5 trial court to relieve a party from a final judgment or order due to “newly discovered evidence
 6 that, with reasonable diligence, could not have been discovered in time to move for a new trial
 7 under Rule 59(b).” Rule 60(b)(2). To prevail, “the movant must show the evidence (1) existed at
 8 the time of the trial, (2) could not have been discovered through due diligence, and (3) was of
 9 such magnitude that production of it earlier would have been likely to change the disposition of
 10 the case.” *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990). “The plain terms of the
 11 Rule establish two predicate circumstances to move for such relief—there must have been a trial,
 12 and the evidence must have been unavailable within the period to move for a new trial under
 13 Rule 59(b).” *Creech v. Kind Lending LLC*, No. CV-22-00871-PHX-SMB, 2024 WL 4591811, at
 14 *8 (D. Ariz. Oct. 28, 2024). “[B]ecause Rule 60(b)(2) provides relief only after a trial has
 15 occurred,” requests for “relief from [] pre-trial orders on motions to dismiss” are “outside the
 16 ambit of what the Rule allows the Court to consider.” *Id.* This construction of the rule is
 17 particularly apt here, where Benshoof fails to demonstrate how any purported “newly discovered
 18 evidence” would change the Court’s order that Benshoof’s counterclaims fail as a matter of law.
 19 See Dkt. # 66 at 7, 9; *see also Myles v. Sullivan*, No. CV-04-05329-JAT, 2010 WL 4628688, at
 20 *3 (E.D. Cal. Nov. 8, 2010) (“The Court finds no reason to reconsider its prior order dismissing
 21 this case without prejudice . . . [where] Plaintiff has provided no facts to change the Court’s prior
 22 holding.”); *Aero/Chem Corp.*, 921 F.2d at 878. Here, no trial occurred. Accordingly, the relief he
 23 seeks is beyond the scope of Rule 60(b)(2) and his request for relief fails.

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Likewise, Rule 60(b)(3) is equally unavailing as the basis for Benshoof's motion. "To prevail [on a Rule 60(b)(3) motion to vacate], the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense." *De Saracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir. 2000). Further, "the moving party must have a valid defense to the dismissal motion they wish the Court to vacate; otherwise it would be a 'fruitless gesture' to set aside the judgment[.]" *Puente v. Cnty. of Los Angeles*, No. CV075809PSGFMOX, 2008 WL 11452489, at *3 (C.D. Cal. July 3, 2008) (citing *Alexander v. Robertson*, 882 F.2d 421, 425 (9th Cir. 1989)).

It is difficult to decipher the exact "fraud" that Benshoof alleges. But even assuming that all of the allegations in his motion are true, none are relevant to the Court's order dismissing all counterclaims for "fail[ure] to state a claim that provides independent federal jurisdiction[.]" See Dkt. # 66 at 2; *see e.g., Naharaja v. Wray*, No. 3:13-CV-01261-HZ, 2015 WL 5970346, at *2 (D. Or. Oct. 12, 2015) ("[E]ven assuming Plaintiff's accusations, as outlandish as they are, were true, Plaintiff fails to establish grounds for relief under Rule 60(b)(3). None of Plaintiff's accusations are relevant to this Court's decision to dismiss Plaintiff's complaint because he failed to state a claim."). Benshoof does not, and cannot, prove that 1) the dismissed counterclaim defendants "obtained" the dismissal order "through fraud," and that 2) "the conduct complained of prevented [Benshoof] from fully and fairly presenting [a] defense" to dismissal. *See De Saracho*, 206 F.3d at 880. The Court dismissed the counterclaims in this matter on the basis that those Section 1983 claims lacked any support for the requisite state action element, Dkt. # 66 at 7-9, and because defendant Narver is immune, *id.* at 9-12. A connection between Benshoof's fraud allegations—to the extent he even makes them—and the dismissal of his counterclaims for

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1 failure to state a claim as a matter of law, does not exist. Thus, Benshoof also fails to prove he is
 2 entitled to relief under Rule 60(b)(3).

3 In sum, the Court should deny Benshoof's Motion to Vacate as procedurally improper
 4 and because it fails on the merits.

5 **B. Benshoof's Motion for In Camera Review Is Also Improper.**

6 Benshoof's Motion for in Camera Review is improper because the Court cannot grant the
 7 relief he seeks. Specifically, Benshoof seeks an order—in a now-closed case—compelling
 8 dismissed parties to produce their attorney-client privileged records. Benshoof seeks these
 9 records “under the crime-fraud exception to a claim of privileged communications.” Dkt. # 76 at
 10 2. Like his Motion to Vacate, his Motion for in Camera Review also fails on procedural and
 11 substantive grounds.

12 **1. Benshoof may not compel production of documents to support his claims after
 13 those claims have been dismissed.**

14 The crime-fraud exception does not provide litigants an independent right to review
 15 documents. It is a basis for compelling discovery or trial evidence. *See Cunningham v.*
 16 *Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1416 (S.D. Cal. 1994). Specifically, “the crime-
 17 fraud exception insures that the confidentiality enveloping the attorney-client relationship does
 18 not encompass communications ‘made for the purpose of getting advice for the commission of a
 19 fraud or crime.’” *In re Grand Jury Proc.*, 87 F.3d 377, 381 (9th Cir. 1996) (quoting *United*
 20 *States v. Zolin*, 491 U.S. 554, 563, 109 S. Ct. 2619, 2627, 105 L.Ed.2d 469 (1989)); *see also*
 21 *Medicraft v. Washington*, No. 2:21-CV-01263-BJR, 2023 WL 3467360, at *3 (W.D. Wash. Apr.
 22 21, 2023) (noting “crime-fraud exception applies when party seeking discovery has made prima
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1 facie case that attorney advice was sought to further commission of a crime or fraud"). It is an
 2 exception to the rule that privileged communications are not discoverable in litigation.

3 As a means for compelling evidence, the crime-fraud exception has no applicability 1)
 4 after a final judgment where there is no further trial or discovery, *see e.g., Gill v. Mayorkas*, No.
 5 C20-939 MJP, 2022 WL 92986, at *2 (W.D. Wash. Jan. 10, 2022) (motion to compel is moot
 6 after motion to dismiss is granted); or 2) against individuals who are no longer parties to a
 7 lawsuit and thus could not be compelled to produce records, *see In re Chevron Corp.*, 633 F.3d
 8 153, 168 (3d Cir. 2011) (order compelling dismissed party to produce documents would be
 9 unenforceable). Given that the Court already has dismissed this case, including the
 10 counterclaims, Benshoof has no basis to compel production of any materials, let alone privileged
 11 materials from the dismissed parties.

12 **2. Benshoof also fails to demonstrate that the crime-fraud exception applies here.**

13 Even if the Court could consider Benshoof's Motion for in Camera Review (which it
 14 cannot), Benshoof also fails to make the requisite showing of a criminal or fraudulent scheme as
 15 necessary for the crime-fraud exception to apply. To compel production of privileged records
 16 under the crime-fraud exception, a party must first "show that the client was engaged in or
 17 planning a criminal or fraudulent scheme when it sought the advice of counsel to further the
 18 scheme." *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007) (cleaned up).
 19 Benshoof appears to allege "criminal assistance to [] kidnapping" as the requisite criminal
 20 scheme. Yet he does not, and cannot, cite to any kidnapping conviction or even a charge
 21 involving the dismissed counterclaim defendants. None exists. His opinion of what constitutes
 22 kidnapping is insufficient. *See id.* at 1091-96. Because Benshoof fails to demonstrate a criminal
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1 scheme to invoke the crime-fraud exception, his Motion for in Camera Review also fails on its
2 merits. The Court should deny the motion.

3 **IV. CONCLUSION**

4 For the reasons stated above, dismissed counterclaim defendants Mack and Narver
5 respectfully request that the Court deny Benshoof's Motion to Vacate and Motion for in Camera
6 Review.

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9 I certify that this memorandum contains 2,035 words, in compliance with the Local Civil
10 Rules.

11 DATED this 24th day of January, 2025.

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13 PACIFICA LAW GROUP LLP

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15 s/ Jessica A. Skelton
16 Jessica A. Skelton, WSBA #36748
17 Attorneys for Counterclaim Defendants
18 Sarah E. Spierling Mack and Gregory C. Narver

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